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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1788

LOCAL UNIONS NOS. 2188 AND 1974,
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1a-9a) is reported at 494 F. 2d 1087. The Board's decisions and orders (Pet. App. B 10a-104a) are reported at 199 NLRB Nos. 49 and 45.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1974. The petition for a writ of certiorari was filed on May 29, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly deferred the exercise of its unfair labor practice jurisdiction pending an effort by the parties to resolve the dispute under the grievance and arbitration procedure of their collective bargaining agreement.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. App. C 105a-108a. Also relevant are the following provisions of—

1. The National Labor Relations Act, as amended (61 Stat. 136-137, 29 U.S.C. 151):

> Section 1. * * * Experience has proved that protection by the law of the right of employees to organize and bargain collectively safeguards commerce from injury * * * be encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
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> * * * * *
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce * * * by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

2. The Labor-Management Relations Act (61 Stat. 154, 29 U.S.C. 173(d)):

> Section 203(d). Final Adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. * * *

STATEMENT

A. The Board's Decision

Western Electric Company ("the Company") manufactures communications equipment at plants throughout the country, including the two plants here involved, located at Shreveport, Louisiana, and Omaha, Nebraska (Pet. App. 12a, 52a, 57a-58a; *I*A. 351, 347; *II*A. 552, 559).[1] For some years production and maintenance employees at the Company's Shreveport and Omaha plants have been represented, respectively, by Local Union Nos. 2188 and 1974, International Brotherhood of Electrical Workers, AFL-CIO ("the Union") (Pet. App. 15a 49a-50a, 58a; *I*A. 18-19; *II*A. 41-42, 257). The collective bargaining agreements at both plants provided for the movement of personnel *(i.e.,* promotion, downgrading, and lateral transfer) within an intra-plant organizational division referred to as a "manager's organization" (Pet. App. 3a, 13a, 15a-16a, 42a-44a, 46a n.2, 60a-61a). In 1969, the Omaha unit employees were restructured into three manager's organizations; there had formerly been only two such groups (Pet. App. 2a-3a, 15a-19a; *II*A. 60, 274-275, 612). In 1970, a similar change was made at the Shreveport plant, creating two manager's organizations in place of one (Pet. App. 3a, 50a; *I*A. 408, 282).

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[1] "*I*A." refers to volume I of the Appendix below; "*II*A.", to volume II.

Before the Board, the Union did not contest the Company's right under the contracts to reorganize the plants in this manner, but urged that the employee movement provisions of the contracts should be applied as if the organizational changes had never occurred (Pet. App. 3a-4a, 13a, 39a, 51a). Any other interpretation of the contracts, according to the Union, would drastically affect the seniority rights of employees since each worker's field of movement would be restricted to the new smaller organization (Pet. 3; Pet. App. 3a, 13a).

The Company, on the other hand, argued that the contractual movement of personnel clause, by its terms, operated to limit each employee's seniority rights to the "manager's organization" to which he was assigned pursuant to the reorganization. Since it was free under the management rights clause of the contract to make the reorganization (Pet. App. 14a n. 2, 59a), the Company contended that it was authorized to give effect to the new organizational structure at each plant in accordance with the literal terms of the movement of personnel clause (Pet. App. 4a, 24a-25a, 26a n. 13, 51a, 67a). In any event, the Company urged, the issue was one of contract interpretation that should be referred to the grievance and arbitration procedure of the collective bargaining agreements, which provided for binding arbitration of such disputes (Pet. App. 12a, 32a-33a and n. 18, 46a-47a and n. 5, 52a, 53a).

The disputes at the Shreveport and Omaha plants came before the Board on separate charges and complaints alleging that the Company had unilaterally changed the working conditions of its employees in violation of Section 8(a)(5) and (1) of the Act (Pet. App. 4a, 12a, 51a-52a).

In each case the Board determined that the dispute centered on the meaning of the movement-of-personnel provisions of the collective bargaining agreement and that this issue could best be resolved through the grievance and arbitration procedure of the agreement (Pet. App. 39a-40a, 46a-47a).

In accordance with its decision in *Collyer Insulated Wire*, 192 NLRB 837, the Board (with one Member dissenting), concluded that it would be appropriate to withhold its processes pending an effort by the parties to resolve the dispute through the contractually agreed upon procedure. The Board thus dismissed the complaints but retained jurisdiction for the "purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular, or have reached a result which is repugnant to the Act" (Pet. App. 10a-11a, 41a-42a, 47a-48a).

B. The Decision of the Court of Appeals

The court of appeals held that the Board's policy "of deferral to grievance and arbitration procedures," announced in *Collyer Insulated Wire, supra*, "is clearly valid" (Pet. App. 5a). The court stated (Pet. App. 5a, 7a):

> It should be understood that the *Collyer* decision and those now under review are not based upon any right of the employer to compel the union to utilize grievance procedures rather than file charges with the Board. Rather, they proceed from the Board's asserted

> power to withhold its processes when to do so will best serve the policies of the Federal labor laws. * * *
>
> * * * * *
>
> We read the *Collyer* doctrine as a balancing rule which requires deferral to arbitration only where a balance of both supporting and antagonistic policies favors deferral. * * *

Deferral was appropriate here, the court concluded, because "arbitration will very likely be dispositive of the unfair labor practice issue": if the Union wins, the Company's compliance with the arbitration award "would moot the instant unfair labor practice complaints"; if the Company's construction of the contract prevails, "there will be no basis for the charge of unilateral action" (Pet. App. 8a-9a). In addition, the dispute "is clearly within the scope of the [contractual] grievance and arbitration procedures"; the Company "has expressed its willingness to arbitrate"; and there is "no suggestion of anti-union animus such that deferral to arbitration would be a futile gesture; nor does the history of the collective bargaining relationship of the parties indicate that arbitration would not be fruitful" (Pet. App. 9a).

ARGUMENT

1. The instant petition challenges an application of the policy announced by the Board in *Collyer Insulated Wire, supra*, 192 NLRB 837, to withhold its processes in appropriate unfair labor practice cases pending an effort by the parties to resolve the underlying contractual dispute through the grievance and arbitration procedure in their collective bargaining agreement. A similar challenge to the Board's *Collyer* policy is raised in the petition in *Provision House Workers Union Local 274, AFL-CIO* v.

National Labor Relations Board, No. 73-1593, October Term, 1973. For the reasons stated in our opposition to the petition for certiorari in that case,[2] we submit that the court below correctly held that the *Collyer* policy "is clearly valid" (Pet. App. 5a) and that it was properly applied here (Pet. App. 8a-9a).

2.a. Petitioners argue that, because "the authority of the Board and the law of the contract are overlapping, concurrent regimes,"[3] an aggrieved party has a right of election to pursue its remedies either before the Board or before an arbitrator and the courts. However, as the court below recognized (Pet. App. 5a), it is well settled that the Board has "considerable discretion to * * * decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act." *International Harvester Co.,* 138 NLRB 923, 925-926, quoted with approval in *Carey* v. *Westinghouse Corp.,* 375 U.S. 261, 271. See also discussion at p. 17 of the Board's brief in opposition to certiorari in *Provision House Workers Union Local 274, supra,* No. 73-1593.

b. Petitioners acknowledge (Pet. 8-9) that this Court in *Carey* v. *Westinghouse, supra,* "expressly approved" the Board's longstanding policy of post-award deferral to arbitral decisions. See *Spielberg Manufacturing Company,* 112 NLRB 1080. They seek to distinguish the *Collyer* policy of pre-award deferral to contractual grievance and arbitration procedures on the ground that in these situations "the party asserting the violation of a statutory right has chosen to file an unfair labor practice charge

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[2]Copies of that opposition have been served on the parties to this case.

[3]*National Labor Relations Board* v. *Strong,* 393 U.S. 357, 360.

rather than proceed to arbitration" (Pet. 9). The Board's post-award deferral policy, however, rests not on a theory of election of remedies by the party aggrieved, but on the fact that such deferral effectuates the statutory policies. In *International Harvester, supra,* for example, the individual charging party before the Board had not invoked the contractual grievance procedure; rather it was the respondent union that filed the grievance and won the arbitral award, to which the Board then deferred in dismissing the complaint. 138 NLRB at 925-929, petition for review denied *sub nom. Ramsey* v. *National Labor Relations Board*, 327 F. 2d 784 (C.A. 7), certiorari denied, 377 U.S. 1003.

c. Petitioners dismiss as dictum (Pet. 6) this Court's express approval of the *Collyer* policy in *William E. Arnold Co.* v. *Carpenters District Council,* No. 73-466, decided May 20, 1974, slip op. 4-5. They then quote at length (Pet. 10-13) from the Court's holding in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, that an employee who is unsuccessful in remedying his claim of racial discrimination through a contractual grievance and arbitration procedure is not thereby barred, on an election-of-remedies theory, from maintaining a court action under Title VII of the Civil Rights Act of 1964 (78 Stat. 253, 42 U.S.C. 2000e, *et seq.).* However, as noted in the Board's opposition to certiorari in *Provision House Workers, supra*, No. 73-1593, pp. 17-18, that decision is not controlling here, for Congress in enacting the Civil Rights Act chose to rely on private suits as the primary means of vindicating the rights of individuals conferred by Title VII. And, significantly, such suits are under the control of the individual complainant, rather than his collective bargaining representative which controls the presentation under the grievance procedure. By contrast,

Congress in the National Labor Relations Act sought to encourage "practices fundamental to the friendly adjustment of industrial disputes" and "the practice and procedure of collective bargaining" (Section 1, *supra*, p. 2), and adopted a procedure which empowers, but does not require, the Board to exercise its unfair labor practice jurisdiction. Moreover, Congress specifically expressed a preference for "final adjustment by a method agreed upon by the parties * * * [as] the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement" (Labor-Management Relations Act, Section 203(d), *supra*, p. 3). In contrast to the situation under Title VII, the "parties" referred to—the union and employer—are the same in either the Board or the grievance proceedings.

d. Finally, petitioners attack the Board's *Collyer* policy as dilatory because it could involve a three-step procedure: (1) a Board proceeding to determine that the case was appropriate for deferral; (2) an arbitration proceeding; and (3) another Board proceeding to determine whether the arbitration procedure was fair and regular and whether the result reached was repugnant to the Act (Pet. 14-15). However, one of the purposes of the *Collyer* policy is to encourage the parties to settle their disputes voluntarily through the contractually agreed upon procedures without resort to the Board or the courts. To the extent that the policy is successful, it will result in speedy disposition of those cases that are subject to settlement, and will help the Board and the courts to give more prompt attention to those cases that must go to litigation under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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